

## Dubbudu (Migration) [2020] AATA 528 (2 March 2020)

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### DECISION RECORD

**DIVISION:** Migration & Refugee Division

**APPLICANTS:** Ms Tejaswi Dubbudu  
Mr Shrihan Reddy Dubbudu  
Mr Nikhileshwar Reddy Dubbudu

**CASE NUMBER:** 1805614

**DIBP REFERENCE(S):** BCC2017/2580575 BCC2018/1695324

**MEMBER:** Antonio Dronjic

**DATE:** 2 March 2020

**PLACE OF DECISION:** Melbourne

**DECISION:** The Tribunal affirms the decision not to grant the applicants Skilled Independent (Permanent) visas.

Statement made on 02 March 2020 at 11:18am

### CATCHWORDS

*MIGRATION – Skilled Independent (Permanent) (Class SI) visa – Subclass 189 (Skilled Independent) – false or misleading information in a material particular – employment history – payment of mandatory superannuation contributions – information in payslips dating back to August 2013 – opening date of superannuation accounts – waiver of requirement – decision under review affirmed*

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### LEGISLATION

*Migration Act 1958 (Cth), s 65*

*Migration Regulations 1994 (Cth), Schedule 2, cl 189.211; Schedule 4, PIC 4020*

### CASES

*Arora v MIBP [2016] FCAFC 35*

*Batra v MIAC [2013] FCA 274*

*Kaur v MIBP [2017] FCAFC 184*

*Plaintiff M64/2015 v MIBP [2015] HCA 50*

*Trivedi v MIBP [2014] FCAFC 42*

## STATEMENT OF DECISION AND REASONS

### APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Immigration on 15 February 2018 to refuse to grant the applicants Skilled Independent (Permanent) visas under s.65 of the *Migration Act 1958* (the Act).
5. The applicants applied for the visas on 20 July 2017. The delegate refused to grant the visas on the basis that the first named applicant (the applicant) did not satisfy the public interest criteria (PIC) 4020 for the purposes of meeting the requirements of cl.189.211 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
6. The delegate was not satisfied that the applicant worked at Python Technologies as claimed and that several documents submitted by the applicant with her visa application (including the work experience certificates issued by Python Technologies on 18 July 2017 and 20 October 2017, employment contract of 5 June 2013, superannuation contribution reports issued by Python Technologies) contain false and misleading information relevant in a material particular to the applicant's claim for skilled migration points (cl.819.224).
7. The applicants sought review of the delegate's decision on 2 March 2018 and with their applications provided a copy of the primary decision record.
8. On 8 January 2020, the Tribunal wrote to the applicants advising that it had considered the material before it and was unable to make a favourable decision on this material alone and invited the applicants to attend a hearing on 29 January 2020.
9. On 22 January 2020, the Tribunal wrote to the Department informing it that the Tribunal has taken the view that the s.375A certificate of 26 April 2018 is not a valid certificate. The Tribunal invited the Department to revoke the certificate which the Department did on 24 January 2020. On the same day, the Department issued a new s.375A certificate which the Tribunal does not consider to be a valid certificate as it does not properly identify public interest grounds for non-disclosure.
10. The Tribunal has reviewed the information on the Department's files sought to be protected from disclosure. The Department attempted to protect their file notes concerning the inconsistency in documents the applicant provided to the Department. This was later communicated to the applicant in the Department's natural justice letter and reproduced in the primary decision record, a copy of which the applicants submitted to the Tribunal with the review application. In the initial s.375A certificate, the Department stated that the case note is related to the internal Department's operation and is not relevant to the decision. The Tribunal also finds that the information purportedly covered by the certificate is not relevant to the current review.
11. On 29 January 2020, the applicant's representative wrote to the Tribunal submitting that the Department refused the visa application because the applicant was not paid superannuation contributions in the amount of \$20,122. The representative submitted a copy of the applicant's superannuation statement issued by Hostplus stating the account balance as of 31 December 2018.
12. The applicants appeared before the Tribunal on 29 January 2020 to give evidence and present arguments. At the commencement of the hearing, the applicant was informed of the existence of the certificate and advised why this information is not considered relevant to the review.

13. The applicant is 34 years of age and national of India. She is married and has 2 children (a 3-year-old son and an 8-month-old baby). Her sister and parents live in India. Prior to arriving in Australia as the holder of a Student visa in October 2009, she completed a Bachelor of Computer Science degree in India and gained approximately 12 months of work experience as a database administrator. By November 2012, the applicant completed a Masters of Business Information Systems at the University of Ballarat. The applicant's husband completed a Bachelor of Electronics degree in India. His parents live in India and he has a brother in the USA. Neither the applicant nor her husband has blood relatives in Australia. They do not own real estate in India or Australia.
14. On 18 July 2012, the applicant was granted a Subclass 485 visa. She worked at Green Solutions Australia from February to June 2013. On 5 August 2013, she was granted a Subclass 457 visa based on the successful sponsorship and nomination made by Python Technologies, a business located in NSW. Her nominated occupation was developer programmer and her annual salary was \$54,000 not including the superannuation contributions. The applicant stated that her salary was paid in cash on a weekly basis and that most of the time she would be given a payslip from her employer.
15. She gave evidence that in 2011 she opened an ANZ bank account together with her husband. She stated that cash received from her employer was not deposited into the ANZ bank account but used for daily needs. Her husband operates a separate Commonwealth Bank account. The Tribunal requested statements from both ANZ and Commonwealth accounts from 2013 to present time.
16. The applicant commenced employment at Python Technologies in August 2013 and continued to be employed there until August 2017, when she decided to move from NSW to Victoria. She claims that in August 2013, she opened an account with BT Superannuation fund. The applicant initially stated in her evidence that it was only in December 2017 that she realised that her employer was not paying superannuation contributions into her superannuation account.
17. She gave evidence that during the four years she had an account with BT Superannuation, she neither received statements from her superannuation fund nor did she make any enquiries with the fund concerning the balance on her account.
18. The applicant stated that she contacted the director of Python Technologies, Mr Ahmed Arif Ismail, in December 2017 when she realised that he did not transfer her funds from BT Superannuation fund to the new superannuation account she opened with Hostplus in July 2017. The applicant stated that she only realised that the superannuation contributions were not paid into her fund after receiving a letter from the Department dated 28 October 2017, asking her to provide a detailed superannuation statement from 2012 to July 2017.
19. She then changed her evidence and stated that she realised that her employer was not making mandatory contributions into her nominated superannuation account (BT Superannuation) in July 2017. She stated that in January 2018, she reported to the Australian Taxation Office (ATO) that her employer did not pay her superannuation entitlements.
20. When asked why she waited until January 2018 to report to the ATO, the applicant could not provide a meaningful explanation.
21. The applicant stated that she was aware that the Department monitored her employer but is not sure what the outcome of this monitoring was.

22. The applicant and her family moved back to Victoria in September 2017. She commenced part-time employment at Green Solutions (her old employer) in August 2018. She is still employed at this business, works 3 days per week and is again paid her salary in cash.
23. The Tribunal explained the waiver provisions in PIC 4020(4) and asked the applicant if there were any compelling circumstances that affect the interests of Australia or compelling and/or compassionate circumstances that affect the interests of an Australian citizen, permanent resident or eligible New Zealand citizen that justify the grant of the visa in this case. The applicant stated that she does not wish to raise any such circumstances.
24. The Tribunal granted the applicant additional time, until 13 February 2020, to provide additional documentary evidence and submissions in support of her application, including bank account statements for both ANZ and Commonwealth Bank accounts operated by the applicant and her husband, the applicant's PAYG payment summaries and group certificates from 2013 to 2018 and the applicant's tax returns from 2013 to 2018.
25. On 13 February 2020, the applicant's representative submitted:
  - Copies of Ms Dubbudu's tax assessment notices from 2014 to 2017; and
  - Copies of Ms Dubbudu's PAYG summaries from 2013 to 2017.
26. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

#### **CONSIDERATION OF CLAIMS AND EVIDENCE**

27. The issue in this review is whether the visa applicant meets public interest criterion 4020 (PIC 4020) as required by cl.189.211 for the grant of the visa. Broadly speaking, this requires that:
  - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
  - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
  - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
  - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
28. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver

does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

**Has the applicant given, or caused to be given, a bogus document, or information that is false or misleading in a material particular?**

29. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
30. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
31. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
32. With her visa application, the applicant submitted copies of her payslips dating back to August 2013. Those payslips indicate that the superannuation contributions were paid by her employer to the applicant's nominated superannuation fund, Hostplus.
33. In her evidence given at the hearing, the applicant stated that the superannuation account with Hostplus was opened in July 2017.
34. On 29 January 2020, the applicant's representative submitted a copy statement of the applicant's superannuation account held with Hostplus. This statement evidenced the following:
  - The account was opened on 1 July 2018;
  - The first superannuation contribution payment in the amount of \$5,129.80 was made by the applicant's employer on 3 September 2018;
  - There was a total of 5 payments made (the last being made on 6 December 2018) and the balance on the applicant's superannuation account as of 31 December 2018 was \$17,514.
35. Based on this evidence alone, the Tribunal finds that the payslips for the period from August 2013 to at least July 2018 submitted to the Department by the applicant contain false and misleading statements that the payments of superannuation contributions by her employer were made to the Hostplus account on a weekly basis from August 2013. The Tribunal finds that this information was false and misleading at the time it was given and was relevant in a material particular to the applicant's claim for the Australian skilled migration points as per cl.189.224 of the Migration Regulations.

36. The information provided was purposefully false as the evidence revealed that the applicant's employer did not pay mandatory superannuation contributions until after the visa application was lodged with the Department on 20 July 2017 and only after the Department requested a detailed superannuation statement from Hostplus on 28 October 2017.
37. The Tribunal finds the applicant not to be a credible witness. The applicant's evidence related to her employment at Python Technologies was vague and evasive. She gave inconsistent evidence as to when she found out that her employer was not paying mandatory superannuation contributions or when the superannuation accounts were opened.
38. Despite the Tribunal's request, the applicant did not provide her and her husband's statements from ANZ and Commonwealth Bank accounts from 2013 to the present time.
39. The applicant claims that, prior to opening the account with Hostplus, she had another superannuation account with BT Superannuation from August 2013. The applicant did not provide any documentary evidence related to the BT Superannuation account. The Tribunal does not accept her claim that she never received statements from BT Superannuation and never made enquiries with the fund concerning the balance on her account. Based on the evidence before it, the Tribunal is not satisfied that the applicant had a superannuation account with BT Superannuation.
40. Accordingly, the Tribunal is *not* satisfied that there is *no evidence* that the applicant has given, or caused to be given, to the Minister, or an officer of the Department, the Tribunal or a relevant assessing authority, a bogus document or information that is false or misleading in a material particular in relation to her application for a Skilled Independent (Permanent) Subclass 189 visa. Accordingly, the Tribunal finds that the applicant does not meet the requirements of paragraph 4020(1)(a).

**Should the requirements of PIC 4020(1) or (2) be waived?**

41. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03) that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
42. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
43. In considering whether to waive the requirements of subclause 4020(1), the Tribunal has considered whether there are compelling circumstances that affect the interests of Australia or compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen.
44. The applicant did not claim the existence of any circumstances relevant to waiver provisions. Accordingly, the Tribunal is not satisfied that there are compelling circumstances affecting the interests of Australia, or compassionate or compelling circumstances affecting the interests of Australian citizens, Australian permanent residents or eligible New Zealand citizens that would justifying the grant of the visa. Accordingly, the Tribunal has determined not to waive the requirements in subclause PIC 4020(1).

45. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl.189.211.
46. The Tribunal must also affirm the decision not to grant the second and the third named applicants Subclass 189 visas, as it finds that they do not meet the secondary visa criteria in cl.189.311 to be members of the family unit of a person who holds a Subclass 189 visa, and there is no evidence that they meet the primary visa criteria in their own right.

### **DECISION**

47. The Tribunal affirms the decision not to grant the applicants Skilled Independent (Permanent) visas.

Antonio Dronjic  
Member

## ATTACHMENT

### Migration Regulations 1994

#### Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
  - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
  - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
  - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
  - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is **false or misleading in a material particular** means information that is:
- (a) false or misleading at the time it is given; and
  - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...



## ***Migration Act 1958***

### **s.5 Interpretation**

(1) In this Act, unless contrary intention appears:

...

***bogus document***, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...